No. 99-1680

Supreme Court, U.S.
FILED
OCT 25 2000
CLERK

IN THE

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,
Petitioner,

—v.—

CITY OF WAUKESHA, WISCONSIN,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

BRIEF OF MORALITY IN MEDIA, INC. AND NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

BRUCE A. TAYLOR
Co-Counsel
NATIONAL LAW CENTER FOR
CHILDREN AND FAMILIES
3819 Plaza Drive
Fairfax, Virginia 22030
(703) 691-4626

ROBIN S. WHITEHEAD
Counsel of Record
MORALITY IN MEDIA, INC.
475 Riverside Drive
New York, New York 10115
(212) 870-3216

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* v

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. A Finding that Prompt Judicial "Determination" is Required to Satisfy the *FW/PBS* Procedural Safeguards Mandates an Unnecessary Requirement for Municipalities Since a Licensing Ordinance Can Only Provide for the Availability of Prompt Judicial Review, it Cannot Require that the Review be Completed Within a Certain Time. 2

II. The Wisconsin Court of Appeals and the Seventh Circuit are Correct in Their Interpretation that, in the Context of Licensing Ordinances, Prompt Judicial Review Means "Access" to Prompt Judicial Review 4

III. There is a Distinction Between Censorship Schemes Which Involve Decisions Based on the Content of Expression and Applicant Licensing Which Involves Substantial Government Interests. ... 8

IV. If This Court Concludes that Prompt Judicial Review Mandates A Final Decision, *Amici* Urge this Court to Implement a Rule of Procedural Due Process to Instruct Courts How to Hear and Dispose of These Appeals or Judicial Reviews in a Prompt and Expedited Manner 10

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Baby Tam v. City of Las Vegas (Baby Tam II),
199 F.3d 1111 (9th Cir.2000).....13

Books, Inc. v. Pottawattamie County,
978 F.Supp. 1247 (S.D. Iowa, 1997.....3

Boss Capital, Inc. v. City of Casselberry,
187 F.3d 1251 (11th Cir. 1999).....5,6,8,10

City News & Novelty, Inc. v. City of Waukesha,
213 Wis.2d 93, 604 N.W.2d 870
(Wis. Ct. App. 2000).....2,4

Freedman v. Maryland,
380 U.S. 51 (1965).....6,8,9,14

FW/PBS, Inc. v. City of Dallas,
493 U.S. 215 (1990).....1,2,3,4,5,6,7,8,9,10,14

Gasparo v. City of New York,
16 F.Supp.2d 198 (E.D.N.Y. 1998).....7

Graff v. City of Chicago,
9 F.3d 1309 (7th Cir. 1993).....4,5,7

Grand Brittain, Inc. v. City of Amarillo,
27 F.3d 1068 (5th Cir 1994).....5

Heller v. New York,
413 U.S. 483 (1973).....12

Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.,
984 F.2d 1319 (1st Cir. 1993).....5

Lo-Ji Sales, Inc. v. New York,
442 U.S. 319 (1979).....13

Miranda v. Arizona,
384 U.S. 436 (1996).....12

New York v. P.J. Video, Inc.,
475 U.S. 868 (1986).....12

Nightclubs, Inc. v. City of Paducah,
202 F.3d 884 (6th Cir. 2000).....2,11

O'Connor v. City and County of Denver,
894 F.2d 1210 (10th Cir. 1990).....5

Roaden v. Kentucky,
413 U.S. 496 (1973).....12

Schultz v. City of Cumberland,
___F.3d___ , No. 98-4126
(7th Cir. Sept. 26, 2000), 2000 WL 1389619.....9

Steakhouse, Inc. v. City of Raleigh,
166 F.3d 634 (4th Cir. 1999).....9

TK's Video, Inc. v. Denton County,
24 F.3d 705 (5th Cir. 1994).....5,6,14

Ward v. County of Orange,
217 F.3d 1350 (11th Cir. 2000).....9

United States v. O'Brien,
391 U.S. 367 (1968).....9

United States v. Thirty-Seven Photographs,
402 U.S. 363 (1971).....11, 12

STATUTES

19 U.S.C. § 1305(a).....11,12

Cal. Code of Civ. P., Sec. 1094.8.....13

N.Y. Civil Procedure Law, Article 78.....7

Tenn. Code Ann. Sect 7-51-1110(d).....13

Wis. Stats., Ch.68, Sect. 63.13.....4

INTEREST OF *AMICI CURIAE*

Morality in Media, Inc. ("MIM") and the National Law Center for Children and Families, as *Amici curiae*, file this brief in support of the Respondent in this case, which is before this Honorable Court on the merits under the provisions of Rule 37. The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents are being filed concurrently with this brief.

MIM is a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 notes 7 and 8 (1973).

MIM has an interest in this case because it is frequently asked by law enforcement agencies, state legislatures, city councils, and private citizens for advice and guidance on methods to enforce and improve existing laws regulating the distribution of obscenity. MIM recognizes this case to be a major precedent in the area of locating and controlling the effects of sexually oriented businesses at the local level.

More recently MIM has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); and *United States v. Playboy*, ___U.S.___, 120 S.Ct. 1878 (2000).

National Law Center for Children and Families is a Virginia, non-profit corporation and educational organization specializing in supporting law enforcement through training, advice, legal research and briefs, and direct trial and appellate assistance to federal, state, and local prosecutors, police agencies, and legislators throughout the United States and in several foreign countries. The NLC focuses on constitutional, legislative, trial, law enforcement, and other legal issues related to obscenity, child pornography and sexual abuse, broadcast indecency, Internet and World Wide Web regulations and legal obligations, display and dissemination of materials harmful to minors, prostitution, public nuisances, indecent exposure, and the regulation, licensing, and zoning of sexually oriented businesses. NLC has filed numerous friend of the court briefs in this Court involving First Amendment issues, including: *Alexander v. United States*, 509 U.S. 544 (1993) (RICO-obscenity, forfeiture); *Knox v. United States*, 510 U.S. 939 (1993), *Knox v. United States*, 513 U.S. 1109 (1995) (child pornography); *Crawford v. Lungren*, 520 U.S. 1117 (1997) (adult token news racks for magazines harmful to minors); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (public nudity ordinance); and *United States v. Playboy*, ___U.S.___, 120 S.Ct. 1878 (2000)(cable-porn signal bleed).

NLC's Chief Counsel has also filed several briefs with this Court, including: *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (obscenity nuisance); *California v. Freeman*, 488 U.S. 1311 (1989) (prostitution in pornography production); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (RICO-obscenity); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (sexually oriented business regulation); *Reno v. ACLU*, 521 U.S. 844 (1997) (*Brief for Members of Congress* re: CDA), and presented oral argument to this Court in *Flynt v. Ohio*, 451 U.S. 619 (1981).

Amici are filing this brief in support of the Respondent because we believe our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

A city or county licensing ordinance for sexually oriented businesses can only provide the availability of prompt judicial review; it cannot mandate that the review be completed within a certain time. This is so because a city or county council does not have the sovereign power to determine the jurisdiction of state trial courts or those above them and cannot set procedures for those courts that will hear appeals from the local government's administrative decisions. Local legislative bodies have no authority to order a state court to afford any particular degree of promptitude.

Amici argue that prompt access to judicial review by a state court of general jurisdiction is what this Court intended in *FW/PBS, Inc. v. City of Dallas*, *infra.*, by concluding that there be a requirement of "prompt" judicial review from an administrative decision under a municipal ordinance. *Amici* further maintain that it should be sufficient to provide in an ordinance that the sexually oriented businesses can promptly seek review in an appropriate state court. The ordinance would thereby provide an avenue for "prompt" judicial review. The municipalities can provide the "avenue" to seek judicial review, but have no power to require the reviewing courts to dispose of such administrative appeals in an expedited fashion.

However, the superior courts can solve this problem by announcing a rule of procedural due process that is binding on the courts themselves and requires the reviewing judges to dispose of appeals from local administrative decisions in a timely fashion. Such supervision of the administration of justice by the courts protects the rights of all the parties without striking local ordinances or requiring the enactment of new state statutes.

ARGUMENT

I. A Finding that Prompt Judicial "Determination" is Required to Satisfy the *FW/PBS* Procedural Safeguards Mandates an Unnecessary Requirement for Municipalities Since a Licensing Ordinance Can Only Provide for the Availability of Prompt Judicial Review, it Cannot Require that the Review be Completed Within a Certain Time

Cities and Counties can comply with this Court's statement of the need for speedy disposition of municipal or county administration of license applications and enforcement, with the possibility of prompt judicial review of those decisions, as stated in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990), by providing prompt procedural requirements in their ordinances to govern their internal administrative actions. The city and county councils can also provide for prompt access to the judicial review and appeal process available in the superior courts to the license applicant or licensee. The local legislative bodies cannot, however, dictate the speedy resolution time limits within which the reviewing courts dispose of their judicial review of the local government's decisions to grant, deny, suspend, or revoke a license.

In the instant case, the Wisconsin Court of Appeals recognized this dilemma stating: "While a local governing body can pass an ordinance directing judicial review within a short period of time, we doubt that it can also require a court to make a complete and final judicial review on the merits within a specified time period." *City News & Novelty, Inc. v. City of Waukesha*, 231 Wis.2d 93, 115, 604 N.W.2d 870 (Wis. Ct. App. 2000). *See Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000) ("A municipality has no authority to control the period of time in which a state court will adjudicate a matter").

In *Books, Inc. v. Pottawattamie County*, 978 F.Supp. 1247 (S.D. Iowa, 1997) the district court also recognized the dilemma, stating at fn. 7:

> There is no provision, however engineered, that allows a County to force a final determination by its state or federal courts. Such a provision would be beyond a county's power. It is not clear what, if anything, the *FW/PBS* Court meant by concluding the requirement of "prompt judicial review" in a municipal ordinance. This court finds those courts' reasoning which would require a county to attempt the impossible, namely forcing a state or federal court to decide, to be unreasonable and unpersuasive.

Amici maintain that an untenable situation arises if this Court holds that a final determination on the merits is required in order to insure the availability of prompt judicial review of First Amendment considerations. In addition to the inability of municipalities to comply with *FW/PBS* because they cannot order a state court to afford a prompt resolution, this problem is further complicated by the fact that the various States already have in place mechanisms to review administrative determinations that may not provide for any specific degree of promptitude.

To avoid this dilemma, your *Amici* suggest that the language on prompt judicial review by the plurality in *FW/PBS* be found to mean prompt access to judicial review, rather than final judicial determination, as satisfying the requirement for prompt judicial review.

II. The Wisconsin Court of Appeals and the Seventh Circuit are Correct in Their Interpretation that, in the Context of Licensing Ordinances, Prompt Judicial Review Means "Access" to Prompt Judicial Review

The nature of the safeguard, assurance of the availability of prompt judicial review, should not be interpreted to include the rendering of the reviewing court's decision. The essence of the safeguard is the review and not the result. An additional requirement of securing a final determination is unnecessary in the absence of direct prior restraint of speech and misconstrues the purpose of the safeguard.

As Justice O'Connor concluded in *FW/PBS*, 493 U.S. at 228, a licensing ordinance designed to address the secondary effects of sexually oriented businesses need not provide the full procedural safeguards required of a direct censorship law. Such a licensing law does not impose direct censorship of materials and, for that reason, need only provide for prompt access to judicial review and need not guarantee a prompt completion of the judicial review process.

The Wisconsin Court of Appeals in the instant case applied the constitutional framework set forth in *FW/PBS* and correctly held that the ordinance provides for prompt judicial review as stated by the plurality in *FW/PBS*, 493 U.S. at 227-28. The Wisconsin Appeals Court concluded that "the City's ordinance will be upheld as long as expeditious judicial review is available." *City News & Novelty, Inc. v. City of Waukesha*, 231 Wis.2d at 115. The court below found this safeguard to be properly afforded by Sec. 68.13, Wis. Stats., which provides review in the state courts and requires a party to seek that review within thirty days. The Court of Appeals cited several other decisions such as *Graff v. City of Chicago*,

9 F.3d 1309, 1324-25 (7th Cir. 1993), *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993) (finding the *FW/PBS* standards were met where denied applicant could file appeal pursuant to general Massachusetts procedures for informal review of agency decisions), and *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994), in support of its interpretation. Other cases not mandating time limits for a decision include: *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1070-71 (5th Cir. 1994) (finding requirement for expeditious judicial review satisfied where unsuccessful licensing applicant can immediately challenge the regulatory decision in court and request a TRO to prevent closing a business), and *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999). *See also O'Connor v. City and County of Denver*, 894 F.2d 1210 (10th Cir. 1990)(declining to apply *FW/PBS* safeguards where it found adult entertainment licensing scheme imposed no restraint and where plaintiff theater was closed because of significant number of acts of public indecency).

In *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994), a news vendor challenged the constitutionality of an Illinois ordinance governing the licensing of city newsstands. Under the statute, within a specified period after denial of a permit, an appeal to the commissioner of transportation could be made. There was no provision concerning the role of the judiciary in reviewing a denial of a permit. The Seventh Circuit, in holding that the procedural safeguards were sufficient despite the lack of any explicit provision authorizing judicial review, found the availability of the state's common law writ of certiorari to provide an aggrieved party with an adequate means of judicial review. *Id.* at 1325.

In *TK's Video Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994), an adult book and video store brought an action

challenging the county's licensing requirements for adult businesses. Under the statute, a rejected license applicant could seek review within thirty days before the order became final. The Court of Appeals for the Fifth Circuit upheld the ordinance's provisions regarding judicial review, stating at 709:

> Despite contrary suggestions in Justice Brennan's opinion in *FW/PBS, Inc.* and some uncertainty in the language of Justice O'Connor's opinion in the same case, we read the Supreme Court to insist that the state must offer a fair opportunity to complete the administrative process and access the courts within a brief period. A "brief period" within which all judicial avenues are exhausted would be an oxymoron.

In *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), the Eleventh Circuit agreed with the First, Fifth, and Seventh Circuits in holding that this Court's requirement of the "possibility of" prompt judicial review is satisfied with access to judicial review. After reviewing the split in the Circuits, the Court concluded at 1256:

> Boss Capital makes a good argument that *Freedman* requires prompt judicial resolution of censorship decisions, but in the end we conclude that access to prompt judicial review is sufficient for licensing decisions. *Freedman* itself unmistakably requires "a prompt judicial decision"...Still, none of these pre-*FW/PBS* cases involved a licensing ordinance for adult entertainment establishments. Instead they involved censorship.

Amici assert that it was not the intention in *FW/PBS* to require a prompt judicial decision in situations where municipalities provide for the type of judicial review allowable within its powers. For this Court to hold otherwise

would be to invalidate municipal ordinances solely due to the time frames for that particular locale's judicial review procedures. This could lead to arbitrary and inconsistent decisions by the Circuit Courts because of the different procedures of the various state court systems within their jurisdiction.

In *Gasparo v. City of New York*, 16 F.Supp.2d 198 (E.D.N.Y. 1998), the City successfully argued that sufficient judicial review is provided by the availability of a proceeding pursuant to Article 78 of New York's Civil Procedure Law. This type of proceeding is a form of action that provides the relief that was previously obtained by writs of *certiorari*, *mandamus* and prohibition. The District Court noted that neither Supreme Court nor Second Circuit case law had addressed whether an action brought pursuant to Article 78 is sufficient to satisfy the requirements noted in *FW/PBS*.

The *Gasparo* Court, in upholding the judicial review procedure as adequate, looked to the Seventh Circuit decision in *Graff v. City of Chicago*, *supra*, finding the statutory schemes to be virtually identical and agreed, stating, 16 F.Supp.2d at 212:

> ... a majority of judges in *Graff* concluded--though for different reasons--that the availability of a *certiorari* action constituted sufficiently prompt judicial review. The five judge plurality in *Graff* held that because an unsuccessful applicant for a permit could obtain judicial review through the common law writ of *certiorari* and could raise his constitutional claims through that mechanism, judicial review was available for the purposes of the First Amendment.

Your *Amici* assert that the Wisconsin Court of Appeals, along with the First, Fifth, Seventh, and Eleventh

Circuits, are correct in holding that the appropriate standard to be applied, with respect to judicial review of license denials in this area, is that of access to prompt judicial review, not the additional requirement of a prompt judicial decision. The dangers of a censorship scheme do dictate that a prompt decision be had as established by the *Freedman* Court. *Freedman v. Maryland*, 380 U.S. 51 (1965). Unlike censors, who pass judgment on the content of expression, licensing officials look at technical and ministerial facts in deciding whether to issue a license. *See FW/PBS*, 493 U.S. at 229. Thus, licensing decisions are different and *Amici* agree with *Boss Capitol* where the Court states: "We believe this is a situation for 'treating unlike things differently according to their differences.'" *Id.* at 1256.

III. There is a Distinction Between Censorship Schemes Which Involve Decisions Based on the Content of Expression and Applicant Licensing Which Involves Substantial Government Interests

Amici agree with the Wisconsin Court of Appeals in *City News & Novelty*, 231 Wis.2d at 113:

> While the *Freedman* Court apparently contemplated timely issuance of a "decision" or "determination," more recently in *FW/PBS* the Court appears to have relaxed this requirement by emphasizing the "possibility" and "availability" of prompt judicial review.

In *FW/PBS* the Court justified the more narrowly defined scope of procedural safeguards because the dangers of the censorship system were not present in the licensing scheme. Justice O'Connor explained that a licensing scheme does not require individuals to judge the content of the

speech. Instead, "the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." 493 U.S. at 229. *See Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 641 (4th Cir. 1999) ("...permitting schemes like Raleigh's do not directly regulate content...They are a far cry from the censorship scheme present in *Freedman.*") *See also Ward v. County of Orange*, 217 F.3d 1350, 1355, (11th Cir. 2000) ("Once again, it is important to stress the differences between censorship schemes and licensing schemes--'the dangers of censorship are less threatening when it comes to licensing schemes.'")

Where a licensing scheme regulates speech and non-speech elements, full procedural protections are not warranted. This Court has allowed state governments greater latitude in regulating "speech plus conduct" than in regulating "pure speech." *United States v. O'Brien*, 391 U.S. 367, 376 (1968), *quoted in FW/PBS*, 493 U.S. at 244. A sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms.

Amici maintain that there is a distinction between censorship schemes that involve decisions based on the content of expression and applicant licensing which involves substantial government interests, such as preserving the public welfare and preventing violations of public health and safety regulations. These substantial interests include: monitoring of businesses for violations of building codes; zoning and interior configuration requirements; monitoring employees for criminal sexual offenses; protecting minors from employment in sexually oriented businesses; prevention of infiltration of control by organized crime; and preventing recidivism by those convicted of sex-related crimes. *See Schultz v. City of Cumberland*, ___ F.3d ___, No. 98-4126 (7th Cir. Sept. 26, 2000), 2000 WL 1389619 (A city

government could require municipal licensing for adult bookstores based on a secondary-effects rationale. The Court upheld inspection requirements, certain portions requiring applicant disclosures, interior-configuration requirements and enabled the City to enforce compliance with the special health and safety requirements for sexually oriented businesses.)

In holding that prompt judicial review means prompt "access" to judicial review, the First, Fifth, Seventh and Eleventh Circuits have given implicit recognition to the application of secondary effects analysis in the context of licensing. By allowing municipalities to license sexually oriented businesses based on the general qualifications of an applicant, these courts recognize that local governments have a substantial interest in preventing crime and urban blight through the use of licensing laws. *See Boss Capital v City of Casselberry*, 187 F.3d 1251, 1256 (11th Cir. 1999) ("Licensing officials do not pass judgment 'on the content of any protected speech'; rather, they look at 'the general qualifications of each license applicant, a ministerial action that is not presumptively invalid.'")

The additional requirement of securing a prompt judicial decision is not imposed by *FW/PBS* and is unnecessary in the absence of direct prior restraint of speech. The distinction between censorship and applicant licensing requires municipalities to provide only access to prompt judicial review.

IV. If This Court Concludes that Prompt Judicial Review Mandates A Final Decision, *Amici* Urge this Court to Announce a Rule of Procedural Due Process to Instruct the Lower Courts How to Hear and Dispose of These Appeals or Judicial Reviews in a Prompt and Expedited Manner

As noted earlier, if this Court determines that a prompt judicial decision is required in order to satisfy the procedural safeguards for licensing sexually oriented businesses, this interpretation will pose great problems for municipalities. *See Nightclubs, Inc. v. City of Paducah, supra*. It would be an unwise exercise of the supervisory powers of the court to announce a judicially imposed rule of procedure that cannot be accommodated by municipalities. The procedural rule should be directed to the court hearing the judicial review, without striking the ordinance on its face.

In the event this Court determines that a specific time period is required, your *Amici* urge this Court to instruct states and cities how they might comply.

The most effective and least burdensome proposition would be for this Court to implement a rule of procedural due process that would require state courts to render a speedy ruling within a time period this Court determines to be a reasonable time. This would significantly aid municipalities and relieve them of the onerous burden of having to forgo enacting and enforcing local regulations until a state legislature either amends an existing statute or adopts a new one. This method of construing a statute to provide procedural due process was adopted by this Court in providing a time limitation for obscenity cases under the Customs forfeiture statute. In *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373-74 (1971), this Court held:

> Given this record, it seems clear that no undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seen undue for importers engaged in the lengthy process of bringing

goods into this country from abroad. Accordingly, we construe Sec. 1305(a) to require intervals of no more than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court.

This rule of judicial administration was followed in *Gasparo*, 16 F.Supp.2d at 210.

As a matter of constitutional law, this Court could instruct the state courts that they must provide an assurance of procedural due process by hearing and disposing of these appeals or judicial reviews in a prompt and expedited manner. This Court could impose specific time limits such as sixty, ninety, or 120 days, if necessary, in order to guide the lower state courts. *Id.* at 373-74.

Amici assert that, as with the *Miranda* warnings, no state statute was required to impose the rule of *Miranda* which dictated that the police must read the *Miranda* rights to an arrested defendant. *Miranda v. Arizona*, 384 U.S. 436 (1966). Nevertheless, every state and federal court knew on and after the *Miranda* decision that the failure to read a defendant his rights would require those courts to suppress evidence or confessions or otherwise provide an exclusionary rule in order to provide the procedural due process afforded under the Fifth Amendment.

Also, in the First Amendment area, this Court imposed a warrant requirement that is not necessary in other Fourth Amendment situations. That rule is self-executing and every state and federal court and law enforcement official knows by reading this Court's decisions what is required of them to provide such procedural due process. *Roaden v. Kentucky*, 413 U.S. 496 (1973), and *Heller v. New York*, 413 U.S. 483 (1973). *See also New York v. P.J. Video, Inc.*, 475

U.S. 868 (1986). But see, when the procedures are not properly followed, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979).

A court's duty to insure proper procedural due process is a matter of the administration of justice and the supervision of the courts, and need not involve the imposition of statutory procedures by the state legislatures nor the Congress. Although the State could impose specific time limits and procedural mandates by statute or by codification of procedural court rules, nothing in the Constitution nor the decisions of this Court requires them to do so. Some states have elected to do so in light of the federal decisions holding municipal ordinances or state statues unconstitutional. *See Baby Tam v. City of Las Vegas*, 199 F.3d 1111, (9th Cir. 2000) (The State amended the Nevada Revised Statutes and the local court's rules of practice to allow for prompt judicial review of claims of prior restraint). *See also, Cal. Code of Civ. P.* Sec. 1094.8 requiring a prompt judicial decision in cases alleging prior restraint of speech or expressive conduct, and *Tenn. Code Ann.* Sect. 7-51-1110(d) providing for prompt review. However, if the federal courts had merely declared the need for judicial promptness in rendering a decision as a matter of procedural due process, then the state courts could have authoritatively construed existing statutes and provided adequate procedural due process, without infringing on the rights of the states to administer their laws and without having had the federal courts enjoin or otherwise declare those state laws facially unconstitutional.

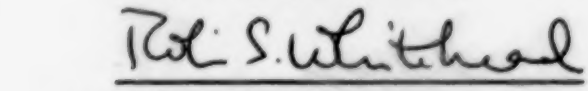
Without the Court's instruction as to the meaning of a prompt judicial determination, if that is what is held is to be required, questions will remain concerning the extent to which a judicial process must be completed before the time period becomes unreasonable. For instance, would "determination" require that an ordinance provide for completion of review at both the trial and appellate levels, or

is an initial judicial determination sufficient? Likewise, is it sufficient that there is the availability of the right to ask the reviewing court for a temporary restraining order to provide a judicial means of insuring the lack of restraint pending review or appeal? As the Fifth Circuit noted in *TK's Video*, to require that "all judicial avenues be exhausted would be an oxymoron" 24 F.3d at 709, and may be inconsistent with *Freedman*, 380 U.S. at 60, that review be provided in a manner "compatible with sound judicial resolution." Any announcement of a rule of procedural due process should be directed at the courts, without the need to strike city or county ordinances or enact new state statutes.

CONCLUSION

For all of the above reasons, your *Amici* pray that this Honorable Court affirm the judgment of the court below and declare the City of Waukesha's licensing ordinance constitutional in that it properly provides for access to prompt judicial review as required by this Court in *FW/PBS*.

Respectfully submitted,



Robin S. Whitehead
Morality in Media, Inc.
Counsel of Record
for Amici Curiae

Bruce A. Taylor
National Law Center for
Children and Families
Co-Counsel